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IN THE

Supreme Court of the United States.

No. 603. October Term, 1946.

MATILDA J. FELDMAN,

Petitioner,

v.

THE PENNROAD CORPORATION.

BRIEF ON BEHALF OF RESPONDENT AGAINST PETITION FOR CERTIORARI.

I. PRELIMINARY STATEMENT.

The present petition represents *one of four separate and distinct attempts* to have the Supreme Court of the United States review the approval by the Supreme Court of Delaware of an agreement, dated March 2, 1945, between The Pennroad Corporation, hereinafter called "Pennroad", and The Pennsylvania Railroad Company, hereinafter called "Pennsylvania", settling for $15,000,000.00 the litigation involving these two corporations and their directors, which litigation has been going on since 1932.

1. Situation Prior to Beginning of Present Action.

This litigation consisted of (1) a suit in the Court of Chancery of Delaware, the Perrine suit, begun in 1932, and (2) two actions in the District Court of the United States for the Eastern District of Pennsylvania, the Overfield-Weigle cases, begun in 1939 and 1940.

Pursuant to a condition of the settlement agreement, a petition for approval of the settlement was presented by Pennroad to the Court of Chancery of Delaware, in which the Perrine suit was pending.

That court, on March 19, 1945, directed that notice should be given to all shareholders of Pennroad (about 100,000 in number) by mail and by newspaper advertising, that a hearing on the petition would be held before the Vice-Chancellor at Wilmington on April 23, 1945.

2. Present (Feldman) Action.

At this stage of the proceedings, Matilda J. Feldman, *who had not taken any part in any of the litigation from 1932 on,* began the present *entirely new action,* by filing a complaint on April 16, 1945, in the United States District Court for the District of Delaware. The jurisdiction of the court *rested solely on diversity of citizenship.*

The plaintiff stated that she held stock of Pennroad, but did not state how many shares. She stated that she was acting for holders of stock in an amount approximating 10,000 shares (about 6,000,000 shares were outstanding: Record, 14a). She did not state when this stock had been acquired or give the names of any of the persons whom she claimed to represent.

The amended complaint repeated the various allegations concerning the wrongs which Pennsylvania had done to Pennroad, substantially as these wrongs had been set forth in the Perrine suit and in the Overfield-Weigle cases.

It alleged further that the board of directors of Pennroad was about to make a "nefarious" (13a) settlement of the litigation for $15,000,000.00, because the directors of Pennroad were under the control and domination of Pennsylvania (15a), and that the settlement

> "represents a Pennsylvania dictated unconditional surrender of a wholly defenseless, unrepresented, weak respondent." (13a.)

The complaint then stated that Pennroad was endeavoring to obtain court approval for the settlement, and that

a hearing was scheduled in the Chancery Court of Delaware for April 23, 1945. (14a.)

In view of the fact that the board of directors of Pennroad was under the control and domination of Pennsylvania, Feldman alleged that there could not be

> "an impartial, forceful and true representation by the respondent in the proposed hearings on respondent's petition of the true facts." (15a.)

Feldman, therefore, asked that the District Court appoint a receiver for Pennroad and enjoin Pennroad from making a settlement with Pennsylvania.

A hearing on a motion for a temporary restraining order and the appointment of a receiver pendente lite took place on April 20, 1945, and the court agreed at the conclusion of the hearing to sign a restraining order provided Feldman filed a bond.

No bond was filed, and nothing further was done in the Feldman case until April 26, 1945, when the amended complaint was filed.

Pennroad moved to dismiss the complaint, and on May 11, 1945, Judge Bard, specially sitting, filed his opinion dismissing the complaint, (Record, 23a). Feldman appealed to the Circuit Court, which, on May 21, 1946, affirmed the District Court's order, (Record, 42).

3. Proceedings in Perrine Suit.

Meanwhile, a great deal had gone on in the *Perrine suit.*

Beginning on April 23, 1945, and continuing until May 11, 1945, hearings had been conducted in the Court of Chancery of Delaware at Wilmington, before Vice-Chancellor Pearson, on the application of Pennroad for approval of the settlement agreement.

Perrine, through her counsel, Mr. Keenan, and Feldman, (*the same Matilda J. Feldman, who is the plaintiff in this action*), through her counsel, Mr. Brady, did not

merely take part in those proceedings, but *conducted the proceedings.* No other shareholders of Pennroad participated in opposition to the settlement.

During these proceedings, over 1,000 pages of testimony were taken, and ten witnesses were examined, four of them called by Mr. Keenan and Mr. Brady on cross-examination.

There were introduced into evidence at that hearing by Mr. Keenan and Mr. Brady, physical exhibits, including all briefs of all counsel in the Overfield-Weigle cases, covering well over 1,000 pages, and of course all the court opinions handed down by various courts during the years of litigation.

After three months of consideration, the Vice-Chancellor, on August 24, 1935, handed down a decision approving the settlement.

He declared:

> "From the evidence, I conclude and find that in entering into the settlement the directors were free from disqualifying interests, and that they acted in good faith." (43 A. 2d 727, 728).

He further held:

> "Good faith may, nevertheless, be impugned by a showing that the settlement is so unfair and grossly inadequate, from the standpoint of the corporation, as to impel the conclusion that it emanates from acts of bad faith, or a reckless indifference to the rights of others interested, rather than a reasonable exercise of business judgment." (citing cases.)
>
> "The reasonable doubts and possibilities referred to [of getting a judgment in the Perrine case against Pennsylvania] are not susceptible of precise reduction to a numerical ratio by any method of which I am aware. The court is not called upon to make an appraisal in the nature of an advisory opinion. Compare: In

re Midland United Co., D. C. 58 F. Supp. 667, 681. However, the long history of the litigation, the magnitude of the offer in settlement (particularly when compared with the amount of the only damages awarded by any judgment in favor of Pennroad on the basic claims), the testimony of the learned solicitors, Mr. Wolf and Senator Hastings—all viewed in the factual setting of the record before me—furnish full warrant for the conclusion that the acceptance of the offer was within the reasonable exercise of business judgment and did not assail the good faith of the directors." (43 A. 2d 728.)

It may be added that Mr. Keenan and Mr. Brady filed voluminous briefs with the Vice-Chancellor, and after his decision against them, they filed a long petition for a rehearing, and a brief in support of that. This petition was denied.

They then appealed to the Supreme Court of Delaware, and that court unanimously, after consideration of several months, on May 27, 1946, affirmed the decision of the Vice-Cancellor in spite of extensive arguments on behalf of Perrine and Feldman.

The Supreme Court said, among other things:

"It nowhere appears that these directors [the directors of Pennroad] were under the influence of the defendant Pennsylvania Railroad Company." (47 A. 2d 487.)

It also said:

"Wherever it appears that there is fraud or unfair dealing on the part of the Directors in arriving at a settlement, the Court will always take jurisdiction of the case and set aside any settlement arrived at by such means. Karasik v. Pacific Eastern Corporation, 21 Del. Ch. 81, 180 A. 604; Winkelman v. General Motors Corporation, 48 F. Supp. 490." (47 A. 2d 488.)

It also said:

> "We cannot say that the settlement of a $22,104,515.00 judgment for $15,000,000.00 is so grossly inadequate that it shows bad faith on the part of the directors of a corporation who approve it. Considering again the question of whether the Vice-Chancellor should have heard the case on its merits, before determining whether the settlement was a fair and reasonable one, the record discloses that he did hear such testimony from which he might well arrive at the conclusion that the outcome of the litigation was uncertain." (47 A. 2d 489).

Feldman and Perrine have *filed petitions for writs of certiorari* to the Supreme Court of the United States *from the decision* of the Supreme Court of Delaware *in the Perrine case,* but the printed petition and the record have not been filed yet in that action (October Term 1946, No. 595).

4. Other Proceedings in the Supreme Court of the United States.

Just to complete the story, we may add that a *shareholder of Pennsylvania,* named Dickheiser, has filed a petition for certiorari to the Supreme Court of the United States from a judgment of the Circuit Court for the Third Circuit, dismissing his complaint that the settlement was totally unwarranted *from the standpoint of Pennsylvania,* and constituted a complete waste of that corporation's funds.

Finally, Perrine asked an extension of time to file a petition for certiorari to this Court from the judgment of the Circuit Court *in the Overfield-Weigle cases,* but an examination of the record in that court showed that the time for filing such a petition had passed, and the Supreme Court of the United States on September 18th, 1946 therefore refused to grant the extension. (No. , October Term 1946.)

II. QUESTIONS INVOLVED.

Where (1) a stockholders' suit has been commenced in a state court (Delaware) and (2) thereafter another stockholders' action (involving the same matters) is commenced and tried in a federal court, and the Circuit Court of Appeals has dismissed that action, and (3) a petition for approval of the settlement of the entire litigation is presented by the corporation to the Delaware court,

1. Should another federal court (other than the one in which the stockholders' action was pending) sitting in Delaware, appoint a receiver for the corporation and enjoin the proceedings in the Delaware court on the petition to approve the settlement?

2. Is it error for the federal court in such case to assume that the Delaware court will conduct the hearings on the petition with due regard to the rights of all interested parties?

3. After the Supreme Court of Delaware affirms the decision of the Court of Chancery of Delaware approving the settlement, and both these state courts find that the directors of the corporation acted in good faith and within the reasonable exercise of business judgment, was it error for the Circuit Court to affirm the dismissal of a complaint asking the appointment of receivers for the corporation, and an injunction against the proceedings (then already completed) in the state court?

4. Where a stockholder took a principal part in the proceedings in the state court in opposition to the approval of a settlement, appealed to the Supreme Court of the state, and is attempting to appeal from the Supreme Court of the state, to this Court *in that action*, is he not estopped to prosecute *another action* (namely the present action) brought to enjoin the proceedings in the state court, and to have a receiver appointed for the corporation?

5. Where the entire matter before the Supreme Court of the United States has become moot because of the status of the litigation involved, will the Supreme Court grant certiorari?

III. REASONS FOR DENYING CERTIORARI.

This action is a diversity of citizenship case, presenting no constitutional question.

The main reason for denying the petition for certiorari is that the action on which it rests is based solely on allegations all of which have been adjudicated untrue, and asks relief which a federal court could not have granted at the time that the complaint was filed and which the course of events makes it impossible to grant at this time.

The allegations were that the directors of Pennroad in office at the time of the settlement were under the control and domination of Pennsylvania and entered into the settlement at the dictation of Pennsylvania. The relief asked was an injunction against going ahead with proceedings for approval of the settlement by the Court of Chancery of Delaware, and the appointment of receivers for Pennroad.

Judge Bard, sitting in the District Court for District of Delaware, could not under the law have enjoined Pennroad from going ahead in the Court of Chancery of Delaware for any reason—and certainly not on any assumption that that court would not give all parties in interest a fair and impartial hearing and decide the case according to the law of Delaware, *by which laws Judge Bard himself, sitting in a federal court in Delaware, also would be bound.* (Maris, Cir. J. at Record, 45.)

So he could not grant the injunction.

Perhaps he could have appointed a receiver, if he had believed that Pennroad was in imminent danger, but since *the only imminent danger alleged was the making of the settlement,* Judge Bard held that "it must be assumed, as pointed out above, that Pennroad and its stockholders will

be adequately protected from this alleged imminent danger by the Chancery Court of Delaware, where hearings are presently being held to obtain judicial approval of the settlement''. (Record, 28a, 29a.)

By the time that Feldman's appeal to the Circuit Court came up, the proceedings in Delaware had terminated by the approval of the settlement, and the Circuit Court held that after fighting that case, and losing it, Feldman was bound by the determination by the Delaware courts (adverse to Feldman's contention) of the basic facts that the directors of Pennroad acted in good faith, and that there was nothing in the amount of the settlement which stigmatized the directors' acceptance of it as reckless and dishonest (Record 46).

We submit that both the District Court and the Circuit Court decided the case in the only way that they could decide it.

Feldman's remedy, if she had any, was in the state court of Delaware—*and she went in there, alleged all that she had alleged in the present case—and lost.*

Or, if she thought that the federal court which had jurisdiction of the Overfield-Weigle cases was being treated improperly by reason of the proceedings in Delaware, she could have intervened in those cases. She didn't.

She never could hope to get relief from the District Court in Delaware, on the theory that the state courts of Delaware would conduct their proceedings in violation of the law of Delaware or the Constitution of the United States.

IV. DISCUSSION.

1. With Respect to Injunction.

Judge Bard dismissed the prayer to enjoin Pennroad from consummating the settlement, on the ground that he was without power to grant the prayer, in view of Section 265 of the Judicial Code (28 U. S. C. A. Sec. 379) which, with an exception not applicable to our case, prohibits federal courts from granting injunctions "to stay proceedings in any court of a state". (Record 25a.)

The fact that Feldman does not even mention this section or attempt to argue that Judge Bard did not interpret it correctly, is full admission that his conclusion cannot be disputed.

The hearing scheduled before the Court of Chancery obviously was a "proceeding", and the injunction prayed for, if granted, of course would have resulted in staying this proceeding.

This, the federal court may not do: *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 62 S. Ct. 139.

The suggestion contained in "Reasons for Allowance of the Writ" (Petition, 11), that somehow or other the application to the Delaware court was a manoeuver to circumvent Rule 23 (c), was not made in the complaint in this case.

Rule 23 (c) was not even mentioned in the complaint.

On the contrary, the complaint said that Pennroad required someone other than the Pennsylvania dominated directors "to truly present after investigation *to the Court of Chancery* the facts." (Record 15a.)

There is nothing in the record to show why the proceedings for approval of the settlement were taken in the Perrine suit and not in the Overfield-Weigle cases, and certainly nothing to show any improper motive, but even without anything in the record, it is clear that stockholders were not deprived of their day in court, and it seemed more

natural to proceed in the Perrine suit than in the Overfield-Weigle cases, because (1) the Perrine suit had been brought much earlier than they (1932, instead of 1939), and (2) *it had not been decided,* whereas the Overfield-Weigle cases *had been decided* by the Circuit Court in favor of Pennsylvania.

The federal court whose right to pass in the settlement is supposed by Feldman to have been flouted, dismissed the charge of impropriety in connection with 23 (c) completely, (Record, 45).

2. With Respect to Matter Dehors the Record.

Feldman's chief argument in support of her petition for certiorari seems to be that the District Court dismissed the complaint on the basis of facts not set out in the complaint.

The supposed facts are contained in the following statement in Judge Bard's opinion:

> "This court must assume that the State Court will do justice to all parties, and, if there is merit in the allegations herein presented, that the State Court will grant whatever relief may be just and proper." (Petition, 13.)

If this assumption indeed were a *statement of fact,* we respectfully call attention to the fact that Feldman's complaint nowhere averred that the Court of Chancery *would not do justice* to all parties or if the complaint had merit, *would not grant just and proper relief.*

However, Judge Bard's words are of course *not the statement of any fact.* They are merely the expression of the universally recognized maxim that it will be presumed that in law all things will be done *"rite"*, that is, properly and according to law.

Feldman apparently, without alleging or proving anything to the contrary, contends that Judge Bard should have enjoined the proceedings in the State Court on the ground

that he assumed that the State Court *would not do justice or grant just and proper relief.*

No court could or would make such an assumption.

3. Decisions of Delaware Court and Estoppel of Feldman.

Feldman founded her complaint on the fact allegation that the Pennroad directors were under the domination and control of Pennsylvania, and were being made by Pennsylvania, the tools for a "nefarious" settlement (Record, 13a).

By the time her appeal reached the Circuit Court the Court of Chancery of Delaware had

> "found as a fact after a full hearing that the Pennroad directors acted in good faith in agreeing to the settlement. Moreover, it had found that the sum of $15,000,000 offered in settlement was not so grossly inadequate as to stigmatize the directors' acceptance of it as reckless and dishonest. We note also that the decision of the Court of Chancery was affirmed by the Supreme Court in Delaware and is now final": per Maris, Cir. J. (Record, 46).

In view of this finding how could the Circuit Court in this case stultify itself by sustaining a complaint founded solely on allegations thus *judicially negatived* in the Perrine suit?

Feldman scarcely can claim that the Circuit Court should have shut its eyes to the Delaware courts' decisions, and pretended to be ignorant of them, when Feldman's main criticism of Judge Bard's decision is that an *examination of those very decisions* showed that those courts had refused, as Feldman claims, to inquire into the merits of the settlement. (Petitions 8, 14.)

However that might be if Feldman had not taken an active part in the Delaware litigation, certainly when she was one of the two main actors in it, she is bound by the adjudication.

There then is no escape from the Circuit Court's conclusion:

> "Inasmuch as the plaintiff is now permanently precluded from establishing the factual basis of her alleged cause of action, the dismissal of her complaint must be affirmed." (Record, p. 46.)

4. Whole Matter Is Moot.

Since the decision of the Circuit Court in this case, the judgment of the Circuit Court in the Overfield-Weigle cases has become final.

This Court so ruled, when on September 18th, 1946, it refused to give Perrine, Feldman's co-objector, additional time to file a petition for certiorari in the Overfield-Weigle cases.

With the Overfield-Weigle cases thus finally and completely ended by a judgment in favor of Pennsylvania, and with the Perrine suit ended except for the possibility of the grant of a certiorari by this court *in that suit,* the present case is moot. If this court grants certiorari in the Perrine case, as this same petitioner has asked it to do, the whole issue presented in this case can be presented there. If this court denies certiorari in the Perrine suit, the whole issue presented in this case will have been adjudicated.

There is nothing that can be added to the general situation by prolonging the life of this practically dead action.

5. Conclusion.

Certiorari should be denied.

Respectfully submitted,

Morris Wolf,
Gordon A. Block,
Attorneys for The Pennroad Corporation.

October 31st, 1946.